UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Mirant Americas Energy Marketing, LP, Mirant California, LLC, Mirant Delta LLC, and Mirant Potrero, LLC — Docket No. EL03-158-000

ORDER APPROVING CONTESTED SETTLEMENT

(Issued June 27, 2005)

1. On September 30, 2003, Commission Trial Staff and Mirant Americas Energy Marketing, LP; Mirant California, LLC; Mirant Delta LLC; and Mirant Potrero, LLC (collectively, Mirant) filed a Settlement Agreement (September 30 Settlement Agreement). That Settlement Agreement resolves all issues, except the issue of double selling, related to Mirant that were set for hearing in Docket No. EL03-158-000 in the Commission's Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior (Gaming Order).[1] On December 19, 2003, Trial Staff and Mirant filed a further Settlement Agreement resolving the issue of double selling (December 19 Settlement Agreement). The Settlement Agreements together resolve all issues related to Mirant that were set for hearing in the Gaming Order.

2. On October 20, 2003, the California Independent System Operator Corporation (CAISO) and Southern California Water Company filed comments objecting in part to the September 30 Settlement Agreement. On October 20, 2003, the California Parties[2] and the Port of Seattle, Washington (Seattle) filed comments objecting to the

[1] *American Electric Power Service Corporation*, 103 FERC ¶ 61,345 (2003) (Gaming Order), *reh'g denied*, 106 FERC ¶ 61,020 (2004) (Gaming Order Rehearing).

[2] The California Parties are the People of the State of California *ex rel.* Bill Lockyer, Attorney General; the California Electricity Oversight Board; the California Public Utilities Commission; Pacific Gas and Electric Company; and Southern California Edison Company.

September 30 Settlement Agreement. Seattle adopted the comments of the California Parties. On October 30, 2003, both Trial Staff and Mirant filed reply comments in support of the September 30 Settlement Agreement. In addition, Trial Staff incorporates by reference its General Reply Comments submitted on October 20, 2003 in Docket No. EL03-137-000, *et al.* On November 26, 2003, the California Parties filed a motion to reject the September 30 Settlement Agreement. On December 10, 2003, Trial Staff and Mirant filed a joint answer in opposition to the California Parties' motion.

3. On January 8, 2004 the California Parties and the CAISO both filed comments objecting to the December 19 Settlement Agreement. On January 8, 2004, Seattle filed comments adopting the comments of the California Parties to the December 19 Settlement Agreement. On January 20, 2004, both Mirant and Trial Staff filed reply comments in support of the December 19 Settlement Agreement.[3] On June 1, 2004 the presiding judge certified the Settlement Agreements to the Commission as contested, but recommending their approval subject to conditions.[4]

4. On March 22, 2004, both Trial Staff and Mirant filed comments on the Certification opposing a condition related to payments under the December 19 Settlement Agreement (discussed *infra*). On March 24, 2004, the Official Committee of Unsecured Creditors of Mirant Corporation (Mirant Creditors) filed a motion to intervene out-of-time and comments on the Certification. CAlifornians for Renewable Energy (CARE) filed a motion to intervene out-of-time and response to the Mirant Creditors' comments on March 29, 2004. The Mirant Creditors replied to CARE's response on April 1, 2004. The California Parties filed a reply to the comments in response to the Certification on April 5, 2004.[5]

5. On January 25, 2005, the California Parties, Mirant, and staff from the Commission's Office of Market Oversight and Investigation (Settling Parties) requested that the Commission stay the proceeding in this docket pending approval of a settlement executed between the Settling Parties (Global Settlement) pending before the Mirant

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[3] The terms of the Settlement Agreements and these various pleadings are described in more detail in the presiding judge's certification. *Mirant Americas Energy Marketing, LP*, 106 FERC ¶ 63,028 (2004) (Certification).

[4] *Id.* at P 87-91.

[5] At this late stage of the proceeding, after the certification of settlements, we are not persuaded to grant intervention to the Mirant Creditors or CARE. *See, e.g.*, *EcoEloctrica, L.P.*, 105 FERC ¶ 61,325 at P 1 n.1 (2003); *Williams Energy Marketing & Trading Company*, 105 FERC ¶ 61,168 at P 8 (2003); *Southern Company Services, Inc.*, 101 FERC ¶ 61,373 at P 13 (2002).

Bankruptcy Court, the PG&E Bankruptcy Court, and the Commission. The Global Settlement resolved, among other things, claims against Mirant in the Gaming Order proceeding.[6] However, the Global Settlement states that it does not affect pending Gaming Order settlements with Trial Staff, consideration paid by the Mirant Parties pursuant to those settlements or preclude any Settling Participant from receiving or advocating an allocation of those settlement proceeds.[7]

6. On April 13, 2005, the Commission approved the Global Settlement, which included an agreement that the California Parties would withdraw their objections to the September 30 Settlement Agreement and the December 19 Settlement Agreement and request approval of these settlement agreements without modification.[8] On April 22, 2005, consistent with the Global Settlement, California Parties filed to withdraw their objections to these latter two settlement agreements.

7. The Settlement Agreements constitute a reasonable resolution of this proceeding and will be approved. The Settlement Agreements reasonably address and resolve the charges against Mirant that were set for hearing in the Gaming Order. In this regard, Mirant will be returning $332,411 and will provide a pre-petition claim against Mirant's estate in the amount of $3,665,811.59,[9] the total revenues (and not merely the profits – and thus more than would be achieved in litigation[10]) from Mirant's alleged participation in gaming practices.[11]

8. Moreover, issues raised in the comments filed by the CAISO and Seattle largely go to the scope of the this proceeding, are thus essentially requests for rehearing of the

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[6] *See* Global Settlement Explanatory Statement at 5.

[7] *See Id.* at 5 n.4.

[8] *San Diego Gas & Electric Co.*, 111 FERC ¶ 61,017 (2005). *See* Global Settlement at § 5.1.2.

[9] The timing of the payment of this latter amount, as distinct from the former amount, is discussed below.

[10] Gaming Order, 103 FERC ¶ 61,345 at P 1, 2, 71.

[11] We will require, consistent with the September 20 and December 19 Settlement Agreements and as agreed to below, that any amounts paid out by Mirant be deposited into the Trust Account previously established to receive amounts paid out in these so-called Gaming Proceeding. *See* Certification, 107 FERC ¶ 63,028 at P 75, 87.

Gaming Order and, in fact, were addressed and denied in the Gaming Order Rehearing.[12] Such matters thus need not be further addressed here.

9. The presiding judge recommended that the Commission approve the Settlement Agreements with the following conditions: (1) Mirant must petition for the approval of the Settlement Agreements by the Bankruptcy Court immediately; (2) Mirant must petition for permission to pay the settlement amount for double selling as provided in the December 19 Settlement Agreement as a prepetition claim (or, in the alternative, as an offset against funds owed to Mirant and currently held in the CAISO settlement accounts); and (3) Mirant must deposit into the Trust Account the $332,411 from the September 30 Settlement Agreement (and any remaining funds after offset).[13]

10. Mirant does not oppose either condition one or three as to the Settlement Agreements.[14] Therefore, acceptance of the Settlement Agreements is conditioned on Mirant's seeking immediate Bankruptcy Court approval of the Settlement Agreements[15] and depositing $332,411 into the Trust Account.

11. However, Mirant and Trial Staff object to condition two as to the December 19 Settlement Agreement. Mirant claims that that condition substantially changes the terms of the December 19 Settlement Agreement and would result in Mirant's withdrawal from the December 19 Settlement Agreement. Mirant contends that the amount at issue in the December 19 Settlement Agreement cannot be paid out in the same manner as the funds at issue in the September 30 Settlement Agreement. Mirant argues that the September 30 Settlement Agreement provided for the payment of a substantially smaller amount which is likely to be less than the cost to Mirant of litigating. Thus, it contends, this amount can

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[12] Gaming Order Rehearing, 106 FERC ¶ 61,020 at P 85.

[13] Certification, 106 FERC ¶ 63,028 at P 88.

[14] In its comments on the certification, Mirant notes that it does not oppose condition one as to the September 30 Settlement Agreement; Mirant is silent with respect to condition one as to the December 19 Settlement Agreement. As Mirant expressly did not oppose condition one as to the former and did not object to condition one as to the latter, and as we see no distinction between the two with respect to immediately petitioning the Bankruptcy Court for approval of the Settlement Agreements, we will adopt condition one as to both.

[15] We assume, without deciding, that the Settlement Agreements require Bankruptcy Court approval. Given the benefits to Mirant from settling these matters rather than litigating them, we are hopeful that the Bankruptcy Court will approve the Settlement Agreements.

be considered as an administrative claim, which can be paid on a dollar-for-dollar basis prior to Mirant's emerging from bankruptcy (as it arguably preserves Mirant's estate by settling for less than the estimated costs of litigation). This same argument, they contend, cannot be made as to the December 19 Settlement Agreement.

12. In addition, Mirant states that the amount provided for in the December 19 Settlement Agreement ($3,665,811.59) is based on the revenues received by Mirant, and thus is a superior remedy than could be achieved through litigation, which, if successful would reflect a disgorging of profits. It also states that any remedy ordered as a result of litigation would be recovered as an unsecured pre-petition claim against the Mirant estate. Accordingly, the priority for any remedy due as a result of litigation would be the same as that provided for in the December 19 Settlement Agreement.

13. We agree with Mirant and Trial Staff that the December 19 Settlement Agreement provides for a fair resolution of the issues, and, in fact, a better resolution than could be achieved in litigation. The second condition recommended by the presiding judge would substantially change the terms of the December 19 Settlement Agreement, and would, by Mirant's withdrawal, undo the December 19 Settlement Agreement, putting the parties back into litigation where the best result would be a lesser remedy than that in the December 19 Settlement Agreement. That is, the amount to be disgorged in the December 19 Settlement Agreement allows a larger recovery than would be achieved in litigation.[16]

14. Finally, given our determination in the Gaming Order Rehearing not to expand the scope of this proceeding, the release provision in paragraph 4.4 of the September 30 Settlement Agreement and in paragraph 4.4 of the December 19 Settlement Agreement, releasing Mirant from further scrutiny of its trading activities at issue in Docket No. EL03-158-000, and also from further scrutiny as to allegations of double selling in Docket Nos. EL03-158-000 and ER03-746-000, *et al.*, is reasonable.[17]

[16] The December 19 Settlement Agreement remedy and the results of any litigation would both equally be pre-petition claims.

[17] *Compare* Certification, 106 FERC ¶ 63,028 at P 29, 51, 64, 75, 90 *with supra* note 1.

15. This order terminates Docket No. EL03-158-000.

By the Commission. Commissioner Kelly dissenting in part with a separate statement attached.

(S E A L)

Linda Mitry,
Deputy Secretary.

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(Issued June 27, 2005)

KELLY, Commissioner, *dissenting in part*:

For the reasons I have previously set forth in *Wisconsin Power & Light Co.*, 106 FERC ¶ 61,112 (2004), I do not believe that the Commission should depart from its precedent of not approving settlement provisions that preclude the Commission, acting *sua sponte* on behalf of a non-party, or pursuant to a complaint by a non-party, from investigating rates, terms and conditions under the "just and reasonable" standard of section 206 of the Federal Power Act at such times and under such circumstances as the Commission deems appropriate.

Therefore, I disagree with this order to the extent it approves a settlement that provides the standard of review for changes to the agreement proposed by a party, a non-party or the Commission acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co*., 350 U.S. 348 (1956).

	_____ Suedeen G. Kelly